IN THE
SUPREME COURT OF THE UNITED STATES

NO. 76-5325

BEN EARL BROWDER,

Petitioner,

vs.

DIRECTOR, DEPARTMENT OF CORRECTIONS,
STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The petitioner, Ben Earl Browder, was convicted of rape in the Circuit Court of Cook County on August 27, 1971. He was sentenced to serve not less than four nor more than fifteen years in the Illinois State Penitentiary. Petitioner's conviction was affirmed by the Illinois Appellate Court for the First District, 13 Ill. App. 3d 198 (1st Dist. 1973). Leave to Appeal was denied by the Illinois Supreme Court. Petitioner filed a post-conviction petition which was dismissed and that dismissal was affirmed by the Illinois Appellate Court. 29 Ill. App. 3d 596 (1st Dist. 1975).

The petition for a writ of habeas corpus was filed on January 8, 1976. Respondent filed a motion to dismiss the petition on February 11, 1975. Proceedings were stayed by order of the district court on March 7, 1975, pending disposition of petitioner's state appeal. On October 21, 1975, the district court denied respondent's motion to dismiss and issued a writ of habeas corpus and stayed execution for sixty (60) days. On November 18, 1975, respondent filed a motion to further stay the execution of the writ of habeas corpus and to conduct an evidentiary hearing on the issue of whether or not there was probable cause for petitioner's arrest in 1971. The respondent's motion was granted and an evidentiary hearing held on January 7, 1976. After the evidentiary hearing, the district court ordered the writ to issue with a stay of execution for five days. Respondent filed a notice of appeal on January 27, 1976. The Seventh Circuit Court of Appeals reversed the district court's order issuing the Writ.

At the evidentiary hearing on the petition for habeas corpus, petitioner introduced the state court record into evidence and rested his case. (Tr. 4)* Respondent then made a motion for a directed finding in favor of respondent on the basis that the state court record contained no evidence

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* "Tr." refers to the transcript of the proceedings in the district court.

relating to probable cause and the petitioner had therefore not met his burden of proof. (Tr. 5) The motion was denied. (Tr. 6)

The evidence presented by respondent was as follows: James Newson, a police officer for the City of Chicago, testified that on January 29, 1971, he interviewed Sharon Alexander at her home located at 2906 West Van Buren Street in Chicago, Illinois. At that time she told him that she was attacked and raped by two black males on that night at approximately 3922 West Van Buren Street. She described the assailants as two black males, one light-complected and one dark-complected, both wearing brown jackets, and in their late teens. (Tr. 8-9) Officer Newson then took Sharon Alexander to the Cook County Hospital. (Tr. 10) On January 31, 1971, a copy of this report was obtained by Martin Conroy. (Tr. 35)

On that same day, January 29, 1971, Investigator Stan Thomas of the Chicago Police Department was assigned to interview Sharon Alexander at the Cook County Hospital. (Tr. 16) Miss Alexander told him that one of her attackers was a "Browder", who was about 17 years of age and lived in the 4000 block of West Monroe. (Tr. 21) She knew the offender's name and where he lived because she knew his sister. (Tr. 18) Investigator Thomas contacted Officer Conroy of the Youth Division of the Chicago Police Department for assistance in locating the suspect, a man named Browder, about 17 years of age, who lived in the 4000 block of West Monroe, Chicago.(Tr. 21, 35) Officer Conroy checked the Youth Division files and found the name of a Tyrone Browder, age 16. (Tr. 36) Officer Conroy then interviewed the victim, Sharon Alexander, who told him one offender's last name was "Browder" and that he lived in the 4000 block of West Monroe. (Tr. 37) Officer Conroy called the Browder home and spoke with the mother of Tyrone and Ben Earl Browder, who stated that "if it was an assault on a girl it wouldn't be Tyrone, it would be Ben Earl," her other son. (Tr. 40)

Officer Conroy and three other officers went to the Browder home, identified themselves, and were admitted by the mother, Lucille Browder. Mrs. Browder then introduced Ben Earl and Tyrone Browder and two other teenage black males to the officers. (Tr. 41-42) Tyrone and Ben Earl denied knowledge of the rape, and they were placed under arrest. Officer Conroy suggested that the other two young men accompany them to the police station to participate in the lineup, which they did. (Tr. 42-43) All four persons were given Miranda warnings and processed at the police station. (Tr. 43) While at the police station, Ben Earl Browder was observed by one Officer James, who said that petitioner fit the description of an offender (male Negro, seventeen years old, with a cast on right arm) who had raped Johnnie Mae Johnson on January 30, 1971 on West Adams Street (petitioner's Exhibit 2 at evidentiary hearing). Sharon Alexander and Johnnie Mae Johnson each identified Ben Earl Browder, in a lineup, as her assailant. (Tr. 50-51)

Petitioner in rebuttal offered the testimony of Lucille Browder, who denied stating that the boy the police wanted was probably Ben Earl at the time petitioner was arrested. (Tr. 61) Mrs. Browder further testified that she did not recall if she talked with Officer Conroy on the telephone prior to the arrest. (Tr. 61) Tyrone Browder also testified as to the physical characteristics of himself and his brother, Ben Earl. (Tr. 64-67)

THE EVIDENCE PRESENTED AT THE HEARING ON THE PETITION FOR A WRIT OF HABEAS CORPUS DEMONSTRATES THAT AT THE TIME THE POLICE ARRESTED PETITIONER, THEY KNEW THAT EITHER PETITIONER OR HIS SIMILAR-LOOKING BROTHER HAD COMMITTED THE RAPE; ON THAT BASIS ALONE PROBABLE CAUSE EXISTED FOR PETITIONER'S ARREST.

The police officers who arrested petitioner on the evening of January 31, 1971, possessed the following information concerning one of the two assailants of Sharon Alexander:

1. He was a dark-complected male Negro (Tr. 9);
2. In his late teens, approximately 17 years of age (Tr. 22);
3. His last name was Browder (Tr. 22, 37);
4. He lived in the 4000 block of West Monroe Street, Chicago, Illinois (Tr. 18, 22, 37);
5. A Browder family lived at 4053 West Monroe, Chicago, Illinois (Tr. 36, 41);
6. A Tyrone Browder, age 16 years (Tr. 36), and a Ben Earl Browder (Tr. 40) approximately 17 or 18 years of age (Tr. 42), resided at 4053 West Monroe;
7. Ben Earl Browder was a dark-complected male Negro (Tr. 42);
8. Lucille Browder, the mother of Tyrone and Ben Earl Browder, stated in a telephone conversation with police, "if it was an assault on a girl, it wouldn't be Tyrone, it would be Ben Earl ...." (Tr. 40) (1)

As far as the record discloses, there were only two people in the City of Chicago who met the description of Sharon Alexander's assailant as far as name, address, age and physical description -- those two persons being Tyrone and Ben Earl Browder. In addition, the police obtained a statement from Mrs. Browder that "if it was an assault on a girl, it wouldn't be Tyrone, it would be Ben Earl ...." Due to the relationship of mother and son, the police could reasonably infer that the statement was based either on knowledge of this particular crime or a knowledge of the son's general behavioral pattern. Certainly they could consider this information in determining the probable identity of the offender. Cf. Naples v. United States, 307 F.2d 618 (D.C. Cir. 1962) (defendant's brother told officer that defendant might be involved in homicide). With this information in mind, the police could reasonably believe that Ben Earl Browder had committed the rape.

Even if the statement made by Mrs. Browder is ignored, respondent submits that the remaining information the police possessed was sufficient in itself to establish probable cause. As far as the record indicates, Ben Earl and Tyrone Browder were the only two individuals in the City of Chicago that could fit the entire description of one of the offenders. The petitioner, Ben Earl Browder, and his brother, Tyrone, were very similar in physical appearance. At the time of the arrest, Tyrone was 16 years of age (Tr. 36), and petitioner was 17 or 18 years of age. (Tr. 42) Both were dark-complected. (Tr. 42, 65) Tyrone Browder testified that in 1971 he was "taller" than petitioner (Tr. 67), without giving a specific estimate as to height differential. (Tyrone Browder did testify that he is now 6 feet 2 inches and petitioner is now 6 feet 1 inch. (Tr. 66) Due to this similarity in appearance, the arresting officers could not be certain which of the two brothers was the assailant. They did have probable cause to believe, however, that it was one or the other, or possibly both. As a result, both could be arrested. The information possessed by the police narrowed the possibilities to two persons. The information obtained by the arresting officers was much more specific than information which formed the

basis for the lawful arrest in many other instances. For example, in Cupp v. Murphy, 93 S.Ct. 2000 (1973), the information the police possessed at the time they arrested the defendant for the murder of his wife consisted of the facts that: (1) the bedroom in which the wife was found dead showed no signs of disturbance; (2) the decedent's son, the only other person in the house that night, did not have fingernails that could have made the lacerations on the victim's throat; (3) defendant and his wife had a stormy marriage; (4) defendant had been at his home the night of the murder, but left and drove to central Oregon, claiming he did not enter the house; and (5) defendant volunteered a great deal of information, but expressed no concern for his wife. 93 S.Ct. at 2002. This Court found probable cause existed for defendant's arrest. Id. Certainly, the information possessed by police in the instant case was much more substantial and specific than that found in Cupp v. Murphy, supra.

II

NOTICE OF APPEAL WAS TIMELY FILED.

On October 21, 1975, the district court denied respondent's motion to dismiss and issued the writ staying execution for sixty (60) days. On November 18, 1975, respondent filed a motion for a further stay and for an evidentiary hearing on the issue of probable cause. Respondent's motion was granted and an evidentiary hearing was held on January 7, 1976. On January 26, 1976, the district court ordered the writ to issue with a stay of execution for five days. Respondent filed a notice of appeal on January 27, 1976.

Petitioner claims that the final judgment was entered on October 21, 1975, when the district court denied respondent's motion to dismiss and issued the writ. Petitioner also alleges that respondent's motion for an evidentiary hearing on the petition filed November 18, 1975, was a motion for post-judgment relief under F.R.C.P. Rule 60. Petitioner concludes that respondent cannot appeal the October 21, 1975, order since notice of appeal was not filed within 30 days of that date.

In point of fact, respondent's motion was not filed under Rule 60, but filed pursuant to the Habeas Corpus Act, 28 U.S.C. 2254, and Townsend v. Sain, 372 U.S. 293 (1963), as is clear from the face of the motion. Respondent's motion for an evidentiary hearing was granted pursuant to Townsend. See Minute Order dated December 8, 1975. (Petitioner's Appendix at p. 20) Judgment in this cause did not become final or appealable until all steps required by the Habeas Corpus Act had been completed,including the evidentiary hearing.

CONCLUSION

For the foregoing reasons, respondent prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

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